7-20-2010

Idaho Power Co. v. Dept. of Water Resources Appellant's Reply Brief Dckt. 37348

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF LICENSED WATER RIGHT NO. 03-7018 IN THE NAME OF IDAHO POWER COMPANY,	)	
IDAHO POWER COMPANY, Petitioner-Respondent, -vs- THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent-Appellant.	)	Supreme Court Docket No. 37348-2010

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Washington, The Honorable Susan E. Wiebe, District Judge, presiding

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ARGUMENT

The Idaho Department of Water Resources ("Department") submits this reply brief in response to the statements and arguments in respondent Idaho Power Company's ("Idaho Power" or "Company") brief:

A. THE PLAIN LANGUAGE OF IDAHO CODE § 42-203B AUTHORIZES THE STATE TO INCLUDE TERM CONDITIONS AT THE TIME OF LICENSING.

The question before this Court is whether I.C. § 42-203B authorizes the Department to add a term condition to a hydropower water right at the time of licensing. Respondent Idaho Power's argument that I.C. § 42-203B(7) prevents the Department from adding a term condition to a hydropower water right at licensing is contrary to the plain language of both I.C. §§ 42-203B(6) and 42-203B(7).

I.C. § 42-203B(6) provides:

> The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. ... The director shall also have the authority to limit a permit or license for power purposes to a specific term.

I.C. § 42-203B(6) (emphasis added).

The use of the disjunctive "or" is a clear indication that the Director of the Department has the authority to limit a hydropower water right to a specific term at licensing. Idaho Power cites to the third-to-last sentence of I.C. § 42-203B(7) and argues this restricts the Director's authority. *Response Brief* at 11-15. However, Idaho Power fails to even acknowledge the first sentence of subsection (7), which mimics subsection

(6) and provides in no uncertain terms that the Director, in the exercise of his authority, can include term conditions at the time of licensing:

> The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors: . . . .

I.C. § 42-203B(7) (emphasis added).

The third-to-last sentence of subsection (7) provides, "The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available." Idaho Power argues this sentence means the Director can only insert term conditions at the permit stage. *Response Brief* at 8. This clearly conflicts with the plain language of subsection (6) and the first sentence of subsection (7). Interpretations of statutes that lead to conflicting results are disfavored. In construing statutes, "it is the Court's obligation, where possible, to adopt a construction that will harmonize and reconcile statutory provisions and to avoid an interpretation that will render a statute a nullity." *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Idaho Ct. App. 2006).

Idaho Power also argues the third-to-last sentence of subsection (7) was added to restrict the Director's authority to add a term condition at licensing. *Response Brief* at 13. This is Idaho Power's attempt to create ambiguity in the statute where none exists. This sentence addresses the issuance of future permits, not permits existing at the time the statute was passed. The forwarding looking application of this sentence is evidenced by the fact it is worded in the future tense. The third-to-last sentence of subsection (7) provides the term of years "shall be

determined at the time of issuance of the permit or as soon thereafter as practicable if adequate information is not then available." (Emphasis added). The use of the future tense "shall be" indicates that the intended application was to permits that were to be issued after the statute was in effect. The statement "if not then available" allows a term condition to be established later if there is not sufficient information to set the term when the new permit is issued. The sentence is forward looking, applying to future permits and does not prevent the Department from inserting term conditions at the time of licensing.[1]

B. IT IS THE EXPRESSLY STATED LEGISLATIVE INTENT THAT THE DIRECTOR BE AUTHORIZED TO INCLUDE TERM CONDITIONS AT THE TIME OF LICENSING.

Idaho Power asks this Court to shy away from a "deep and searching" review of the legislative history. *Response Brief* at 12. They do this because they know the legislative history shows it was the stated intent that the State of Idaho be able to include term conditions at the time of licensing.

1. Legislative Intent of Idaho Code § 42-203B(6).

The legislative history of I.C. § 42-203B is inextricably intertwined with the Swan Falls settlement. As a term of the Swan Falls Agreement, Idaho Power agreed to propose and support

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[1] Idaho Power also argues that the State cannot exercise its authority in this case because adding a term condition at the time of licensing of the water right violates the "as soon thereafter as practicable" provision of subsection (7). *Response Brief* at 12. Since subsection (6) and the first sentence of subsection (7) provide that a term condition can be added at the time of license, this shows the Legislature must have considered the time of licensing as a "practicable" time to add the term conditions. Moreover, as is discussed in Subsection (B) of this brief below, it was the stated intent of the legislation to authorize the State to go back and add term conditions at the time of licensing. As such, the time of licensing must be an acceptable time to add term conditions to hydropower water rights.

(jointly with the State) the enactment of I.C. § 42-203B.[2] This was affirmed by the SRBA district court: "[The Agreement] also provided that the parties would propose and support legislation consistent with the provisions of the Framework, including what became I.C. § 42-203B."[3] The SRBA court recognized that Idaho Power helped draft the proposed hydropower legislation that was enacted as I.C. § 42-203B,[4] and that the proposed legislation "clearly and unambiguously reflects the intent of the parties."[5] Thus, as the SRBA court determined, "the Swan Falls Agreement . . . incorporates the provisions of I.C. § 42-203B."[6] The SRBA court also affirmed that "As a term and condition of the Agreement, Idaho Power agreed to the regulatory authority of the State as is now codified at I.C. § 42-203B."[7] In short, as the SRBA court observed, "the Swan Falls Agreement was not a self-executing instrument, but rather

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[2] Swan Falls Agreement ¶¶ 4, 13, 17, Exhibits 7A & 7B, attached as Addendum A to the Department's opening brief.

[3] Memorandum Decision and Order on Cross-Motions for Summary Judgment, *In re SRBA, Consolidated Subcase No. 00-92023 (92-23)*, at 9 (Apr. 18, 2008) ("*SRBA Memorandum Decision*"), attached as Addendum B to the Department's opening brief. *See also id.* at 11 ("Specifically, paragraph 13(A)(vii) of the Agreement refers to and provides for enactment of subordination legislation 'as set forth in Exhibits 7A and 7B attached to this agreement.' Exhibit [sic] 7A and 7B were attached to the Agreement and were to be enacted as I.C. § 42-203B."); *id.* at 22 ("Senate Bill 1008, later codified as Idaho Code § 42-203B, was proposed and introduced into the legislature pursuant to and in accordance with the Swan Falls Agreement. The Swan Falls Agreement was specifically conditioned on the enactment of Senate Bill 1008."); *id.* at 26 (referring to "the agreement between the parties to enact I.C. § 42-203B."). *See also* 1985 Idaho Sess. Laws 25-26 (enacting Idaho Code § 42-203B under Senate Bill 1008).

[4] *SRBA Memorandum Decision* at 38. SRBA Consolidated Subcase No. 00-92023 was dismissed in March of this year, and the *SRBA Memorandum Decision* is a final decision and order. Idaho Power did not appeal the decision.

[5] *SRBA Memorandum Decision* at 32.

[6] *SRBA Memorandum Decision* at 22 (emphasis added).

[7] *SRBA Memorandum Decision* at 1. *See also id.* at 31 ("Idaho Power was simply conceding to and agreeing not challenge the State's regulatory authority"); *id.* at 45 ("Idaho Power simply agreed to the State's regulatory authority as applied to its rights"); *id.* at 46 ("as a term of the contract, Idaho Power agreed to the State's regulatory authority."). As required for the Swan Falls Agreement to become effective and binding, in 1985 the Legislature enacted the hydropower subordination legislation of I.C. § 42-203B. *See* 1985 Idaho Sess. Laws 25-26.

proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties."[8] Idaho Code § 42-203B was the acknowledged centerpiece of the legislation contemplated by the Agreement.

In explaining this important piece of legislation to the Senate Resources Committee, it was Idaho Power's own attorney and Swan Falls negotiator Tom Nelson who stated the express intent of I.C. § 42-203B(6) was to allow the State of Idaho to add new conditions in exiting permits at the time of licensing. At the legislative hearing, Senator William Ringert first raised the question of whether I.C. § 42-203B(6) would allow the Director to add new conditions to existing permits when they were licensed.[9] He observed that because the proposed legislation authorized the Director to subordinate a hydropower "permit or license", the Director would have the authority to insert at licensing a new condition that had not been present in the permit.[10] Tom Nelson responded that the statute had been so drafted because the State "wanted the power to go back and subordinate those [unsubordinated hydropower] permits at the time that they issue the license."[11] Thus, Idaho Power's own representative knew and expressly stated the intent of

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8 *SRBA Memorandum Decision* at 26.

9 Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), at pp. 33-34, attached as Addendum F to the Department's opening brief.

10 *Id.*

11 *Id.* at 34 (emphasis added). While Senator Ringert's comments and Nelson's response address the inclusion of subordination provisions instead of the inclusion of term conditions, the same plain reading of the statute by Senator Ringert for subordination provisions is also is applicable to term conditions. I.C. § 42-203B(6) provides that both conditions may be added to a "permit or license." Given the mirror language, the State undoubtedly wanted the power to go back and include term conditions in permits at the time the Department issues the license as well.

I.C. § 42-203B(6) was to allow the Director to add new conditions to existing hydropower permits when the Director issues the license.

Idaho Power now seeks to avoid discussing the legislative history of I.C. § 42-203B(6), and its relationship to the Swan Falls Agreement, because the SRBA court has already rejected the same arguments Idaho Power has raised in opposition to the statute in this case. As demonstrated by the SRBA court's decision, in the SRBA proceedings Idaho Power attempted to distance itself from I.C. § 42-203B, challenged the statute as ambiguous and unconstitutional, and resisted application of I.C. § 42-203B to Idaho Power's hydropower water rights. The SRBA court reviewed the Agreement and the statute in detail, including the legislative history, and firmly rejected Idaho Power's arguments and positions.

The SRBA court held that the subordination legislation that became I.C. § 42-203B "clearly and unambiguously reflects the intent of the parties," and that "this Court finds it inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract or the intent of the parties."[12] In addressing Idaho Power's contention that it had never understood the statute to mean what it clearly says, the SRBA court commented that "Idaho Power perhaps lacked an appreciation for the plain meaning of the language which it not only agreed to, but helped to draft."[13] The SRBA court also rejected Idaho Power's arguments that I.C. § 42-203B is unconstitutional because the Company had waived any such objections as a term of the

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12 *SRBA Memorandum Decision* at 32.

13 *SRBA Memorandum Decision* at 38.

Agreement: "the Court need not address any potential infirmities with the State's regulatory authority because Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings."[14]

In this case, Idaho Power is taking the same positions before this Court that the Company asserted before the SRBA court, and that the SRBA court rejected. Idaho Power is once again attempting to distance itself from I.C. § 42-203B, once again arguing that the statute means something other than what it plainly states, once again arguing that the intent of the statute is something different from the intent as explained by its own attorney to the Senate Resources Committee in 1985, and once again arguing that the statute violates Idaho Power's constitutional rights. Idaho Power is once again taking a stand directly contrary to what it told the Legislature in 1985, and seeking a judicial ruling that will allow it to retain all of the benefits of the Swan Falls Agreement and yet be released from its obligations under the Agreement.

This Court should reject Idaho Power's recycled arguments for the same reasons the SRBA court rejected them. As the SRBA court determined, Idaho Power helped draft the statute; it is clear and unambiguous and reflects the intent of Idaho Power and the State; its enactment was a term and condition of the Swan Falls Agreement; and as a term of the Agreement, Idaho Power conceded to the State's regulatory authority under I.C. § 42-203B and agreed not to challenge the statute. As clearly and unambiguously set forth in the Swan Falls

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[14] *SRBA Memorandum Decision* at 45.

Agreement and in I.C. § 42-203B(6), the intent of the Legislature and of the parties to the Swan Falls Agreement was that the Department would be authorized to impose a term condition on a hydropower water right at the time of licensing, even if there was no such condition in the permit. Idaho Power's attorney Tom Nelson expressly confirmed this intent in explaining the legislation and the overall settlement when they were the subject of intense legislative scrutiny. Idaho Power's new position on the effect and legislative intent of the statute should be rejected as contrary to the plain language of the statute and of the Agreement as explained to the Legislature.

2. Legislative Intent of Idaho Code § 42-203B(7).

An examination of the legislative history of subsection (7) shows this provision was not intended to preclude term conditions at licensing but rather was the outgrowth of a compromise reached between the parties to the Swan Falls Agreement and the small hydropower interests represented by John Runft regarding the length of term conditions.

When originally enacted in Senate Bill 1008, I.C. § 42-203B contained just subsections (1) through (6). However, House Bill 186, passed later in the same legislative session, added subsection (7) to I.C. § 42-203B. As discussed in the Department's opening brief, John Runft, an attorney representing small hydropower interests, testified before the Senate committee considering Senate Bill 1008. He noted that I.C. § 42-203B(6) expressly prevented term conditions from being added to existing licenses – or as he described it, I.C. § 42-203B(6) expressly "grandfathered existing licenses." Runft asked the legislative committee to change

I.C. § 42-203B(6) so that existing permits would be "grandfathered as well as licenses."[15] This proposed change was rejected based upon the State of Idaho's opposition.[16]

In the same hearing, Runft also sought to add guidance to I.C. § 42-203B on how the Director would determine the length of the terms. The small hydropower users were concerned that if the Director sets a term condition when a permit is first issued, it might inadvertently restrict the length of time the hydropower user would have to get an adequate return on its investment. Through his written testimony before the Senate Committee, Runft testified:

> Lenders and investors will simply not invest in a project where the underlying water right is subject to delimitation at any time by act of the director. Short term water rights (around 5 years) to cover the period of return of capital or pay-off of the development loan will likewise not suffice.
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> * * *
>
> Also, there are the terms of the power contracts to be considered. Virtually all of the contracts for sale of power with the major power companies necessarily contain severe recapture provisions if there is a default in the supply of power during the term of the contract, which is generally 35 years in length. To put it bluntly, time limitations on the water rights for power purposes will reek havoc on the projects of small hydro developers.
>
> * * *
>
> We recommend that the statutory language be amended to require that limitation of a permit or license for power purposes shall not be for a term less than the term of the standard power purchase contract of the utility designated by the water right holder as the utility with which it will seek a power purchase contract. In the event there be no standard power purchase contract or standard contract term

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[15] Attachment to Senate Resources and Environment Committee Minutes (Jan. 21, 1985), entitled "*Revised and Supplemented Testimony By John L. Runft Before the Idaho Senate Committee on Resources and Environment January, 21, 1985*," p. 5 (attached the Department's opening brief as Addendum E).

[16] Attachment to Senate Resources and Environment Committee Minutes (Jan. 25, 1985) entitled "Supplemental Testimony of Attorney General Jim Jones before the Idaho Senate Committee of Resources and Environment," pp. 1, 3. The testimony of Jim Jones was inadvertently left out of Addendum E of the Department's opening brief. Thus, the Department is now attaching it separately to this brief as Addendum L.

available as regards the designated utility, then, in the alternative, the water rights should be for 35 years, which term appears to be the industry standard.[17]

Subsequent to this testimony, agreement was reached between Runft, Idaho Power and the State of Idaho to add subsection (7) to I.C. § 42-203B. As the legislative history provides, subsection (7) was added to address Runft's concern about the length of the term and to give the Department criteria to establish term conditions. The title of the act shows that subsection (7) was not intended to limit the application of term conditions to just permits as argued by Idaho Power. The title to House Bill 186 states that the purpose of the act was "[t]o provide factors the Director of the Department of Water Resources is to consider in limiting permits or licenses for power purposes to a specific term."[18] The written analysis of the bill also shows that its intent was narrow: "The purpose of these amendments is to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects."[19]

In his written testimony before the committee, Runft stated, "Subsection (7) solves an important procedural problem arising out of the diacotomy [sic] presented by the granting of permits on one hand and licenses on the other."[20] The "dichotomy" rises out of the difference between permits and licenses. A permit authorizes someone to begin development on a project.

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17 *Revised and Supplemented Testimony by John L. Runft* at 3-4 (attached as part of Addendum E to the Department's opening brief).

18 Idaho H. 186, 1985 Leg., 48th Sess. 1 (attached hereto as Addendum M).

19 ANALYSIS OF HOUSE BILL 186 1: *Attachment to Minutes of H. Comm. On Res. & Conservation,* 1985 Leg., 48th SESS., 1 (Mar. 6, 1985) (attached hereto as Addendum N).

20 *Statement By John L. Runft: Attached to Minutes of H. Comm. On Res. & Conservation,* 1985 Leg., 48th Sess. 3 (Feb. 15, 1985) (attached hereto as Addendum O).

In contrast, a license is issued after the project is built, the water has been put to beneficial use and entire license process is complete. With a permit, a water user might not start putting water to beneficial use five or possibly ten years after the permit was first approved.

Runft recognized that with new permits, it might be years until the hydropower project was complete and water was being beneficially used to generate power. Subsection (7) was added to ensure that the term condition would not start running from the time the permit was issued but instead would run from the time the water was put to beneficial use, as Runft's explanation to the committee makes clear:

> In exercising his authority to limit such a permit or license to a specific term of years, the term of years so designated shall apply only to the license, even through the designation may be first stated in the permit. Hence, if a permit is "proved up" and the water put to beneficial use within the permit period, then the term of years granted by the director will commence to run for purposes of the license. The license granted will refer back to the date of application to beneficial use as the time of the commencement of the license term.[21]

Runft's testimony highlights that the intent of subsection (7) was not to restrict the State's ability to add to license, but was to allow the term length to either be set or adjusted at the time of licensing based upon when the water was first put to beneficial use. This does not remove the Director's authority to add term conditions at the time of licensing. Idaho Power's argument that the intent of subsection (7) was to prevent the Director from adding term conditions at the time of licensing is contrary to the legislative history.

The fact the State of Idaho supported the changes brought about by addition of

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21 *Id.* at 3.

subsection (7) is significant. If it had been the intent of the changes to undo the State's authority to limit or prevent the issuance of term conditions on existing permits at time of licensing, the State would undoubtedly have fought against the legislation as it is clear the State viewed the ability to add conditions in hydropower licenses as important to prevent future Swan Falls type disputes. This was explained by Pat Kole, the attorney who negotiated the Swan Falls settlement on behalf of the Attorney General, when responding to questions about proposed section 42-203B(6) during a Senate committee hearing on the legislation in 1985: "The effort here was to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future. That is the reason why [proposed Idaho Code § 42-203B(6)] is in the agreement and why we think it is necessary.[22]

Ironically, as discussed in the prior section, Idaho Power's attorney Tom Nelson stated that I.C. § 42-203B as enacted would apply to existing hydropower permits. Now Idaho Power seeks to preclude the State from exercising authority the Company conceded to as part of the Swan Falls settlement. Given the intensity of the Swan Falls conflict, it is inconceivable the State would have acquiesced to this amendment to I.C. § 42-203B after obtaining Idaho Power's concession to the State's authority to insert conditions in existing permits at the time of licensing. Idaho Power now seeks to deprive the State of the authority the State sought to preclude future Swan Falls controversies. The State of Idaho would not have supported language that undercut the very protections it was seeking.

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[22] Transcript of Senate Resources & Environment Committee Meeting (Jan. 18, 1985), at 42-43 (attached the Department's opening brief as Addendum H).

Moreover, if the intent of House Bill 186 had been to preclude the Department from adding conditions at licensing, then the bill would simply have deleted the words "or licenses" from Section (6) – but it did not. Similarly, if House Bill 186 had been understood to preclude insertion of conditions at licensing, then the legislative history for House Bill 186 would have specifically so recognized – but it did not. In short, had the Legislature intended to prevent new conditions at licensing, there was a very easy way to amend the statute to unequivocally do just that, but that is not what the Legislature did, and that is not how House Bill 186 was explained to the Legislature.

C. IDAPA 37.03.08.050.03 IS NOT APPLICABLE BECAUSE IT ADDRESSES ONLY PERMITS AND IS SILENT AS TO LICENSES.

Idaho Power argues that IDAPA 37.03.08.050.03 prevents the Department from inserting a term condition at licensing. This argument is misplaced as IDAPA 37.03.08.050.03 explains how the Department will issue term conditions on permits but does not address licenses. IDAPA 37.03.08.050.03 provides, "A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code." (Emphasis added). A water right permit and a water right license are not the same thing. By its plain reading, the rule applies to permits only. The rule does not address term conditions inserted in a license. Moreover, if one views the rules in their entirety, one can see that the rules establish the process for issuing permits. The rules do not limit the Department's ability to include term condition at the time of licensing. Idaho Power suggests that the lack of a rule about inserting a term condition in a license prevents the Department from including a term

condition in a license. Where there is statutory authority to insert a term condition into a license, however, a rule is not needed to be able to effectuate the statute.

D. IDAHO POWER'S DELAY ARGUMENT VIOLATES THE GOOD FAITH OBLIGATION OF THE SWAN FALLS AGREEMENT BECAUSE AS A TERM OF THE AGREEMENT, IDAHO POWER CONCEDED TO AND AGREED NOT TO CHALLENGE THE APPLICATION OF IDAHO CODE § 42-203B TO ITS WATER RIGHTS.

Idaho Power's argument that the Department delayed too long in licensing water right 03-7018 is based on a repudiation of the terms of the Swan Falls Agreement and is a violation of its express obligation of good faith. As previously discussed, the enactment of I.C. § 42-203B was a condition of the Agreement.[23] Further, the SRBA court determined that Idaho Power helped draft the statute, that the statute is clear and unambiguous, and that as a term of the Agreement, Idaho Power conceded to and agreed not to challenge the statute.[24]

The "Good Faith" provision of the Swan Falls Agreement provides that the "State and Company shall not take any position before . . . any court . . . which is inconsistent with the terms of this agreement."[25] In this case, Idaho Power clearly is taking a position before this Court that is inconsistent with the terms of the Agreement. Idaho Power is not only arguing against application of the plain statutory language that it helped draft and supported in the Legislature as a term of the Swan Falls Agreement, but Idaho Power is directly challenging the State's regulatory authority under I.C. § 42-203B. As a term of the Agreement, Idaho Power

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23 Swan Falls Agreement ¶¶ 4, 13, 17. *SRBA Memorandum Decision* at 9, 11, 22, 26.

24 *SRBA Memorandum Decision* at 1, 22, 31, 32, 45, 46.

25 Swan Falls Agreement ¶ 4.

conceded to and agreed not to challenge the application of the State's regulatory authority under I.C.§ 42-203B to Idaho Power's water rights.[26] In short, as the SRBA court has held, Idaho Power was "fully aware its rights were subject to [I.C. § 42-203B] despite whatever perception Idaho Power has with respect to the State's subsequent conduct or representations."[27] Because Idaho Power's licensing delay argument is directly contrary to the plain language of the Agreement, it a clear breach of the Agreement's obligation of "Good Faith," and a repudiation of the Agreement's terms.

As the SRBA court stated, the Company was "fully aware" that I.C. § 42-203B(6) would apply to its hydropower water rights. Idaho Power's attorney confirmed this awareness when he testified to the Senate Resources Committee that the intent of I.C. § 42-203B(6) was to allow the Department to impose new conditions on a hydropower water right at licensing that had not been in the permit: the Agreement expressly provides that its sets forth all of the parties' understandings,[28] but contains no exception for permit 03-7018 with respect to the application of I.C. § 42-203B.[29] Indeed, as previously discussed, the fact that the Legislature declined to amend I.C. § 42-203B(6) to "grandfather" existing permits left no doubt that water right 03-7018 —which was existing at the time—would be subject to the statute at licensing.

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26 *SRBA Memorandum Decision* at 26, 31, 45, 46.

27 *SRBA Memorandum Decision* at 45.

28 Swan Falls Agreement ¶ 19.

29 *See SRBA Memorandum Decision* at 47 (rejecting the "block of water" argument because, among other reasons, "[n]o promises of guarantees were made to Idaho Power with respect to the availability of excess flows.").

Thus, not only did any licensing delay cause no harm or prejudice to Idaho Power, but Idaho Power's attempt to preclude the Director from imposing a term condition pursuant to I.C. § 42-203B(6) is fundamentally at odds with the clear terms of the Swan Falls Agreement. Idaho Power cannot plausibly claim otherwise, as the SRBA court's holdings on the Agreement have already foreclosed the incorrect arguments and flawed interpretations on which the Company relies in this case.

E. IDAHO POWER WAS NOT PREJUDICED BY DELAY IN ISSUANCE OF THE LICENSE.

Idaho Power claims the Swan Falls Agreement and the pendency of the SRBA do not explain the reason for the delay in issuing the license. *Response Brief* at 35. The SRBA and anticipated litigation over the Swan Falls Agreement are only two of the reasons why the issuance of the license was delayed. Another important reason is that the Department prioritizes new permits and transfers over water rights waiting for licensing. New permits take priority because until a permit is approved, a water user cannot begin to divert water at all. A similar problem arises with transfers. Until a transfer is approve, a water user seeking to move a water right to a new location cannot do so until the transfer is approved. Backlogs in permit and transfers approvals stifle economic development if the Department does not rapidly process the approval. The licensing of water rights is less critical because there is nothing that prevents the water user from continuing to use the water while the right is waiting to be licensed. Consequently, new permits and transfers are given a higher priority. Idaho Power can point to no prejudice from this delay as it has been able to generate power during the time of processing

of its license and will continue to be able to generate throughout the term of its FERC license regardless of the cause for delay in the issuance of this license.

Moreover, even assuming the Department could have issued the license immediately after the beneficial use field exam was completed, it still would have been issued after the passage of I.C. § 42-203B. The statutory changes to I.C. §42-203B became effective on July 1, 1985. The beneficial use exam was completed on September 8, 1985. (Agency R. pp. 88-98.) Thus, even if the Department had issued the license once the beneficial use exam was completed, the statute authorizing the inclusion of the term condition was already in effect. Idaho Power is in the same position today as it would have been if the Department had licensed the water right in 1985 after the completion of the beneficial use exam.

What the Swan Falls Agreement and the SRBA discussion in the Department's opening brief explains is why both Idaho Power and the State of Idaho were in no hurry to dig up the past on the Swan Falls Agreement and to litigate issues of subordination and term conditions. If Idaho Power felt the Department unreasonably delayed the issuance of the license, it could have expressed that displeasure to the Department. Such communication would have been in the license file for this water right and now a part of the agency record. There is no such communication in the file or the agency record. The Legislature has also provided a legal remedy to those who feel that an agency is not complying with its statutory duty by providing for a writ of mandate pursuant to Title 7 of Idaho Code. Idaho Power did not avail itself of this remedy either.

F. THE ISSUE BEFORE THIS COURT IS A NARROW QUESTION REGARDING LEGISLATIVE INTENT THAT DOES NOT REQUIRE THIS COURT TO DETERMINE WHEN A WATER RIGHT VESTS.

Idaho Power argues that "the resounding question before the court is at what point does an applicant, permittee, or licensee, obtain a protectable property interest in its water right whereby the Department cannot arbitrarily change the terms and conditions of the permit." *Response Brief* at 24. This is not the issue before this Court. This case deals with the narrow issue of I.C. § 42-203B and whether the Legislature intended to give the Director the statutory authority to add a term condition in a hydropower water right at licensing. Even if, for the sake of argument, one assumes that submission of proof of beneficial use provides a water user with a vested water right (a position the State strongly disagrees with), the Legislature has express constitutional authority to "regulate and limit" hydropower water rights under Idaho Constitution Article XV, § 3, and it has done so through the enactment of I.C. § 42-203B. If the Legislature passes a statute that a water user believes unconstitutionally impacts a vested property right, the remedy for the water user is to bring a separate action to seek compensation for a taking. *Cf. McCuskey v. Canyon County Com'rs*, 128 Idaho 213, 216, 912 P.2d 100, 102 (1996) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

For purposes of this appeal, it simply does not matter if or when Idaho Power may have acquired a vested right in the permit because the State has express constitutional and statutory authority to "regulate and limit" hydropower water rights, ID. CONST. ART. XV, § 3, and the Legislature exercised the authority to regulate and limit hydropower water rights by passing I.C.

§ 42-20B(6). Further, as a term of the Swan Falls Agreement, Idaho Power waived any right to bring a takings claim based on any alleged deprivation of a property interest resulting from the application of I.C. § 42-203B(6) to the Company's water rights. *See SRBA Memorandum Decision* at 45 ("the Court need not address any potential infirmities with the State's regulatory authority because Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings.").

G. EVEN IF THIS COURT GETS TO THE ISSUE OF WHEN A WATER RIGHT VESTS, THE CASES CITED AND RELIED UPON BY IDAHO POWER AND THE DISTRICT COURT DO NOT STAND FOR THE PROPOSITION THAT A HYDROPOWER WATER USER'S PERMIT VESTS PRIOR TO COMPLETION OF THE LICENSING PROCESS.

Idaho Power argues that many Idaho cases suggest that "once a party had done all that it can do to be in full compliance with Idaho Code § 42-219" (i.e., submits proof of beneficial use to the Department), the water right vests even though the licensing process is not complete. *Response Brief* at 30. Even if this Court were to get to the issue of when a water right vests, the cases cited by Idaho Power either are irrelevant or do not stand for the proposition that a water right vests upon submission of proof of beneficial use.

The Department agrees with the general proposition cited by Idaho Power that it is presumed that the legislature does not intend to overturn "long established principles of law" without expressing the clear intent to do so. *Response Brief* at 25. The problem with applying this maxim to this case is that there are no "long established principles of law" providing that a water user has a protectable interest in a permit once the water right holder submits proof of

beneficial use to the Department or when water is put to beneficial use. In fact, the cases cited by Idaho Power and the District Court suggest otherwise. The first case discussed by Idaho Power is *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). This case does not address I.C. § 42-203B, nor does it discuss the issue of when a water right becomes a vested right. *Pioneer*, instead, addresses the question of who holds title to a water right. While the diversion of water and its application to beneficial use are important in the process of establishing a water right, it is a leap in logic to say this means that a water user is entitled to some sort of quasi-vested water right without completing the steps in the statutory appropriation process.

In its discussion on vesting, Idaho Power ignores the case *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 401-02, 263 P. 45, 52 (1927). In *Big Wood Canal Co.*, the Idaho Supreme Court examined Idaho's application and permit process when the Big Wood Canal Company brought suit to have its water rights decreed. The predecessor of the Big Wood Canal Company was issued a water right permit in February of 1906.[30] Proof of completion of works was due before February 17, 1911, and proof of application of water to the proposed use was due before February 17, 1915.[31] Proof of completion of works was submitted timely, but proof of application was not submitted until 1921, six years after the time permitted by the statutes in force when the application for permit was made.[32] Significantly, however, the Idaho Legislature

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30 *Big Wood Canal Co.*, 45 Idaho at 385, 263 P. at 46.

31 *Id.*

32 *Id.*, 45 Idaho at 393, 263 P. at 49.

amended the deadline to submit proof of application of the water in 1913 and 1915, allowing for extensions for filing proof of application of the water to a beneficial use. The Department of Reclamation (the Department's predecessor) had granted a number of extensions based upon the new legislation.[33] The interveners challenged Big Wood Canal Company's water right by arguing that the laws in effect when the application was issued should have been applied at licensing and that the subsequent legislative changes extending deadlines were improper:

> [A]ppellants urge that the statutes as they existed at the time of respondent's application for permit, and at the time of appellants' applications for permit, being the laws in force prior to 1913, constitute a contract between the state of Idaho and each of said appellants; that the Legislature could not thereafter change the laws so as to extend additional favors to respondent so as to give it a property right which it could not have obtained under the laws as they existed at the time the respondent made its application, or at the time when the appellants secured their permits, when the effect of such legislation would be to deprive the appellants of their water rights which they had acquired under existing laws of the state.[34]

The Court found no direct authority on this issue, so instead turned to what it viewed as analogous situations where deadlines for actions had been extended.[35] Most of the cases examined by the Court dealt with inchoate rights and the effect of the modification of deadlines. The court ultimately concluded that the Legislature's extension of the time to file proof of beneficial use was not retroactive legislation because the permit was not vested.[36] The court held

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33 *Id.*

34 *Id.* 45 Idaho at 396, 263 P. at 50.

35 *Id.*, 45 Idaho at 398, 263 P. at 51.

36 *Id.*, 45 Idaho at 401-402, 263 P. at 52.

that until there is complete compliance with all the statutory licensing steps, the water right does not vest.[37]

Admittedly, the factual situation is different in this case. *Big Wood* addresses a change in the statute while a water right was still in the permit stage. Nonetheless, the Court's analysis of the very nature of a permit and when it vests is applicable. The Idaho Constitution provides that the Legislature may regulate the appropriation and use of public waters. ID. CONST. ART. XV, § 1. *Big Wood Canal Co.* holds that where the Legislature exercises this authority and puts in place a process to grant a property right, the property right does not become fully vested until the process is complete.

The cases cited by Idaho Power in its Response Brief do not stand for the proposition that a water right vests upon the water user submitting proof of beneficial use to the Department. In fact, they lead one to just the opposite conclusion. For example, in *Hidden Springs Trout Ranch v. Allred*, the Court specifically recognized that a water right will vest only upon "proper statutory adherence."[38] As discussed in *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, proper statutory adherence requires the issuance of a license.[39] Until that time, the water user does not have a vested water right.[40]

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37 *Id.*

38 *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 625, 636 P.2d 745, 747 (1981).

39 *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005).

40 *Id.*

Idaho Power also suggests the Department incorrectly cites the holding in *In Re SRBA Case No. 39576* (Subcase No. 36-08099).[41] The Department has correctly cited the holding of that case. The application for permit was filed by River Grove Farms, Inc. ("River Grove"), and the application was approved by IDWR with a subordination provision in it. However, River Grove challenged the inclusion of the subordination provision at licensing, arguing that the Department lacked the statutory authority to insert the subordination provision at the time of permitting and because of this, the Department could not apply I.C. § 42-203B retroactively to a vested right. Then-presiding judge of the SRBA, the Hon. Barry Wood, ruled that, on the contrary, a water right vests when a license is issued. Judge Wood held:

> [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.
> ...
> Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is then to carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, IDWR may refuse to issue the license. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that '[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . ..' It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- including issuance of the license -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the

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41 *In Re SRBA Case No. 39576* (Subcase No. 36-08099), Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimants Notice of Challenge, Snake River Basin Adjudication District Court Subcase 36-08099 (Jan. 11, 2000)(hereinafter "River Grove"), a copy of which was attached as Addendum K to the Department's opening brief.

permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.[42]

As Judge Wood makes clear in *River Grove*, all steps of the licensing process must be complete before a water right fully vests. Simply putting water to beneficial use is not sufficient to vest a water right.

Even if Idaho Power believes that Judge Wood's discussion on vesting is dicta, Idaho Power fails to address the fact that another SRBA judge agreed with Judge Wood's rationale in another case that presented the very issue of when a water right vests. In his *Order Granting Motion to Dismiss Petition for Writ of Mandate* issued January 25, 2008, the Hon. John M. Melanson considered a case in which the petitioner held a hydropower permit that was issued prior to the passage of I.C. § 42-203B.[43] Following enactment of 42-203B(6), the Department imposed a limited subordination condition on petitioner's permit. Later, when the Department announced that it was prepared to issue the license, it invited comment as to whether the subordination condition should be broadened to include aquifer recharge. The petitioners argued that the Director could not modify a condition on a permit when issuing a license, and that the issuance of a license was a ministerial act. Judge Melanson determined that issuing a license is not a ministerial act but rather one requiring the Director to exercise discretion in whether to

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42 *River Grove*, at 24-25 (emphasis added).

43 *North Side Canal Co. v. Idaho Dept. of Water Resources*, Jerome County Case No. CV 2007-1093 (Jan. 25, 2008) (hereinafter "*North Side Canal Co.*") a copy of which was attached as Addendum J to the Department's opening brief.

issue a license or not.[44] In reaching that conclusion, Judge Melanson agreed with Judge Wood's conclusion that a water right vests at the time the license is issued. Judge Melanson found Judge Wood's decision "to be on point and persuasive."[45] Judge Melanson stated:

> This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.[46]

These two decisions therefore hold that a water right vests only when the license is issued and stand in stark contrast to the proposition claimed by Idaho Power that a water right vests as soon as water is put to beneficial use.

Idaho Power also argues that the Court should consider the SRBA district court case *Riley v. Rowan* as authority for preventing the Department from inserting a term condition in water right no. 03-7018.[47] *Response Brief* at 33. *Riley v. Rowan* is distinguishable from the current case and lacks a sound legal basis for the remedy reached by the judge. First, even by the test set out by the judge in *Riley*, the case is not applicable here. In *Riley*, the judge specifically limited the scope of the decision, saying it applied only "where a license issued is consistent with the terms of the permit application, the permit and IDWR's examination... ." (Appeal R., p.

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44 *North Side Canal Co.,* at 12.

45 *Id.*

46 *North Side Canal Co.,* at 12.

47 *Memorandum Decision in Riley v. Rowan*, Case No. 39576, Subcase No. 94-12 (Aug. 28, 1997), Fifth Judicial District Court in and for the State of Idaho, a copy of which can be found in the Record on Appeal at pp. 210-223.

221.) The test established by the court is not met in this case. Here, the permit and license are different. This Court should also discount *Riley* for the lack of legal analysis. There, the district court failed to explain the legal underpinnings of its decision, and the decision lacks an analysis of the district court's authority to fashion the remedy reached. It is also important to note that on appeal to the Idaho Supreme Court, this Court specifically declined to address the issuance of the license, affirming the district court's decision on other grounds. *Riley v. Rowan*, 131 Idaho 831, 834, 965 P.2d 191, 194 (1998) ("Additionally, having determined that Jim Howe and Rowan were tenants in common, each owning a one-half interest in water license No. 22-07280, we decline to address whether the IDWR breached its statutory duty by delaying the issuance of the license.").

In collective review, reading the Supreme Court cases cited by Idaho Power and the district court in the case do not lead to the conclusion that there is a "long established principle of law" providing that a water user has a protectable interest in a permit once they submit proof of beneficial use or put the water to beneficial use. In fact, the cases lead to the opposite conclusion. This is further evidenced by the fact that two SRBA district court judges reviewing the same cases agreed that a water right does not vest until a license is issued. While not directly on all fours with this case, *Big Wood* is instructive and stands for the proposition that until the licensing process is complete, the Legislature is well within its power to change the licensing process. Thus, legislative authorization to include reasonable term conditions into a hydropower water right at the time of licensing does not interfere with a vested interest.

H. THE COURT SHOULD DISREGARD IDAHO POWER'S IMPROPER ATTEMPTS TO SUPPLEMENT THE RECORD.

Judicial review of disputed facts must be confined to the agency record. I.C. § 67-5277. As such, briefs in appellate proceedings should not include new factual evidence not present in the underlying agency record. Through its brief, Idaho Power improperly attempts to augment the record before this Court with new factual evidence not present in the agency record. Specifically, Addendums 1-5 of Idaho Power's response brief present new documents related to other hydropower water rights that were not present in the agency record.[48] In turn, Idaho Power asks this Court to consider legal argument related to those documents and to use the documents to draw conclusions regarding IDWR's understanding of its own authorities. *Response Brief* at 20. This Court should reject Idaho Power's attempts to improperly augment the record as these documents were never made part of the record in this matter before the agency and neither has Idaho Power sought to augment the records as provided by Idaho Appellate Rule 30. Idaho Power should not be allowed to improperly augment the record in this manner, and the Court should strike or disregard any argument related to these documents.

I. THE LICENSING DOCUMENTS REVIEWED BY IDAHO POWER ARE NOT RELEVANT TO THIS PROCEEDING.

Idaho Power undertakes an historical review of Department records to patch together an argument regarding what it states is the Department's understanding of the application of I.C. §

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[48] The Addendums included by the Department in its opening brief are appropriate as they do not represent factual evidence but represent lower court decisions related to this case and documented legislative history. The Court is free to take judicial notice of the legislative history of statutes it is examining. *Knight v. Employment Sec. Agency*, 88 Idaho 262, 266, 398 P.2d 643, 645 (1965)

42-203B. *Response Brief* at 19-23. The licensing documents reviewed by Idaho Power are either irrelevant or do not speak to the Department's interpretation of I.C. § 42-203B.

Idaho Power spends considerable time discussing water right license nos. 29-7578, 29-7772, 32-7128, 32-7136, 47-7768 and 1-7010.[49] These water right licenses simply are not relevant to this case. Contrary to Idaho Power's suggestion, the first five licenses say nothing of the Department's understanding of its authority to add term conditions at the time of licensing. Just because the Department included term conditions in the permits for these water rights, does not mean that the Department believes it lacks the authority to add term conditions at licensing. While the Department did add a term condition to the sixth license (license no. 1-7010) after it was permitted, the condition was added after the applicant filed an application to amend the permit. Just because the Department added a term condition in response to an application to amend the permit, it does not follow that the Department believes it lacks the authority to insert term conditions at the time of licensing.

Idaho Power also brings up water right license no. 65-12096 and argues that because the Department decided not to exercise its authority to add a term condition at the time of licensing proves the Department believes it lacks the authority to do so. Again, this is an incorrect assumption by Idaho Power. The fact the Department decided not to exercise its authority to add a term condition in this license does not mean the Department believes it lacks the authority to

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[49] Should the Court decide that the records relied upon by Idaho Power to make this argument are not properly part of the record as suggested in part H above, the Court would not need to consider this part of Idaho Power's argument.

do so. The Department did not state why it decided not to exercise its authority in this case and any discussion by Idaho Power on this issue is speculation not supported by the record.

J. THIS CASE IS NOT A REFERENDUM ON THE DEPARTMENT'S AUTHORITY TO ADD CONDITIONS ON ALL WATER RIGHTS.

Idaho Power also tries to expand this case into a review of the State's authority to include conditions on all water rights. It suggests "The licensing process for a hydropower water right is the same statutory process employed by the Director to license any other type of water right." *Response Brief* at 10. This is simply incorrect. I.C. § 42-203B does not apply to other types of water rights. It applies only to hydropower water rights. This code section implements the State's authority to "regulate and limit" hydropower water rights under Idaho Constitution Article XV, § 3 and was passed in recognition of the potential impact hydropower could have on water resource development absent state regulation. Because hydropower facilities are generally constructed to use most of the flow of a river, unconditioned hydropower water rights would preclude future use of the water resource. Because this authority applies only to hydropower water rights, there is no basis for Idaho Power's contentions that the Director's licensing order poses a dire threat to all water rights generally.

K. THE PUBLIC INTEREST REVIEW PROVIDED IN THE TERM CONDITION PROVIDES A PRACTICAL SOLUTION TO ISSUES RAISED BY HAVING A HYDROPOWER WATER RIGHT TERMINATE ON A SPECIFIC DATE.

In Idaho Power's license, the Department included a term condition providing for consideration of the public interest. The condition provides:

> The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.[50]

Idaho Power argues that the Department exceeded its authority by inserting a condition that subjects the license to a public interest review. Idaho Power argues the Department only has the authority to designate a specific term of years in the term conditon. *Response* at 14. There are several very practical reasons why the Department does not designate a specific expiration for the license – and these reasons work to the benefit of the hydropower license holder. First, if a hydropower license expires on a specific date, the water right holder would then have to file a new application for permit if they want to continue generating power at the facility. Importantly, a new application means a new priority date. With a specific expiration date, the license holder loses the benefit of their earlier priority date. The Department includes the public interest review instead of including a fixed expiration date to allow the hydropower owner to maintain their priority date. Furthermore, the water right holder would have to pay new fees associated with a new the application and they would have to go through the entire licensing process again. This would put additional burden on both the water right holder and the Department by creating significant work. Moreover, under a new water right application, a water right holder would have to meet public interest criteria as set forth in I.C. § 42-203A. The way the Department

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50 Water Right License No. 03-7018, R. p. 130.

conditions the water right allows the water user to keep their priority date, not have to pay new application fees, not have to jump through the hoops of paperwork and proving up on the water right, but would provide for a public interest review similar to that which the water right holder would have had to go through under a new application anyway. The Department's approach streamlines this process.

Idaho Power also claims that application of this condition would not afford them due process. Idaho Power's claims of lack of due process are easily addressed. Any action by the Department is subject to hearing and judicial review pursuant to I.C. §§ 42-1701A and 67-5270. Thus, the Department would initiate an administrative proceeding before taking action on the water right or otherwise provide a process whereby Idaho Power and all interested parties could participate. If Idaho Power feels that the decision reached by the Department after the hearing is unconstitutional or arbitrary or capricious, it has full opportunity to challenge such action consistent with the review authorities provided by Idaho Code. Thus, Idaho Power would not be deprived of due process of law by applying the current condition.

CONCLUSION

The plain language and legislative history of I.C. § 42-203B(6) show that it was the clear intent to authorize the Department to add term conditions in water rights at the time of licensing. This point was expressly explained to the Legislature by Idaho Power's own attorney. It is without question the intent of I.C. § 42-203B was to prevent future Swan Falls type disputes by giving the Department authority to limit hydropower licenses consistent with Idaho Constitution Article XV, § 3. Idaho Power's attempt to avoid the exercise of this authority does not find

support in the record and is expressly contrary to the Swan Falls Agreement. As was affirmed by the SRBA district court: "[The Agreement] also provided that the parties would propose and support legislation consistent with the provisions of the Framework, including what became I.C. § 42-203B."[51] Idaho Power helped draft the proposed hydropower legislation that was enacted as I.C. § 42-203B,[52] and the proposed legislation "clearly and unambiguously reflects the intent of the parties."[53] As a term and condition of the Agreement, Idaho Power agreed to the regulatory authority of the State as is now codified at I.C. § 42-203B.[54] The "Good Faith" provision of the Swan Falls Agreement provides that the "State and Company shall not take any position before . . . any court . . . which is inconsistent with the terms of this agreement."[55] In this case, Idaho Power clearly is taking a position before this Court that is inconsistent with the terms of the Agreement. Idaho Power should be estopped from challenging the inclusion of term conditions to this water right when it was clear to Idaho Power, as pointed out by their own representative, the intent of Idaho Code § 42-203B(6) was to authorize the Department to include term conditions in existing permits at the time of licensing.

Claims that the delay in licensing prejudiced Idaho Power ring hallow. Idaho Power has not been prejudiced by the delay in licensing as the Company has been able to generate power during the time of the processing of its license and will continue to be able to generate

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51 *SRBA Memorandum Decision*, at 9.

52 *SRBA Memorandum Decision* at 38.

53 *SRBA Memorandum Decision* at 32.

54 *SRBA Memorandum Decision* at 1.

55 Swan Falls Agreement ¶ 4.

throughout the term of its FERC license. Even if the Department issued the license immediately after the beneficial use field exam was submitted in 1985, the license would have still been issued after the effective date of I.C. § 42-203B. As such, the intervening years do not prejudice Idaho Power's legal position.

The sole issue before this Court is whether I.C. § 42-203B authorizes the Department to add a term condition at the time of licensing. This Court does not need to examine the issue of when a water right vests to reach its decision in this case. The issue of vesting is a red herring floated by Idaho Power to distract this Court from the issue before it. The remedy, if one believes their property has been unconstitutionally impinged upon, it to bring a takings claim. Of course, Idaho Power may have forfeited this right because, as pointed out by the SRBA court, the Company previously agreed to the State's regulatory authority over its claims as part of the Swan Falls Agreement.[56]

The Department respectfully requests that this Court reverse the decision of the District Court and find that I.C. § 42-203B authorizes the Director to add a term condition to a hydropower water right at the time of licensing.

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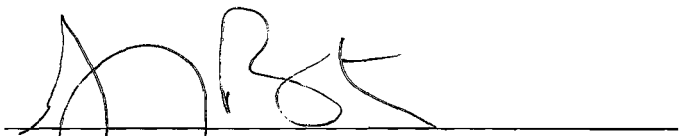
[56] *SRBA Memorandum Decision* at 45.

DATED this 20th day of July, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General



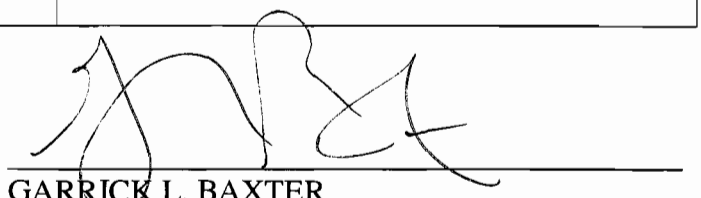
Garrick L. Baxter
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served two true and correct copies of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereon on this 20th day of July, 2010.

Document Served: **APPELLANT'S REPLY BRIEF**

James C. Tucker Senior Attorney IDAHO POWER COMPANY 1221 West Idaho Street Boise, ID 83702-5627	John K. Simpson BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson, Suite 102 P.O. Box 2139 Boise, ID 83701-2139



GARRICK L. BAXTER
Deputy Attorney General

ADDENDUM L

Supplemental Testimony of Attorney General Jim Jones
Before the Idaho Senate Committee on
Resources and Environment

Subject: Comments of Attorney John L. Runft.

On January 21, 1985, John L. Runft, Attorney at Law, appeared before the Committee and provided an analysis of Senate Bills 1006 and 1008. It is important that the Committee carefully analyze Mr. Runft's testimony because it raises several concerns about the agreement. The concerns raised by Mr. Runft were considered by the negotiators and were either rejected as incompatible with resolution of the Swan Falls controversy or provided for by the mechanisms in the agreement. It is my belief that upon careful reflection and thorough analysis that the Committee will find the points advanced by Mr. Runft have been addressed.

The first general observation made by Mr. Runft is that Senate Bill 1008 represents a hybrid that would be better left in two parts 1) resolution of the Swan Falls controversy and 2) standards and procedures for treating hydropower water rights. Mr. Runft's analysis is correct that the bill addresses both of these problems. Yet, the two problems are one in the same. Further, the reason for the structure of the agreement is to prevent future Swan Falls types of situations from arising and

to provide a mechanism under which current Swan Falls type problems can be resolved without expensive litigation. As pointed out earlier, the Spokane River is a prime example of another potential Swan Falls type controversy. The negotiators believed and still believe that a mechanism must be created in state law to provide a resolution process for addressing these problems.

Mr. Runft's second suggestion is to create an exemption process whereby certain hydropower water rights could be specifically exempted from a subordination provision. Senate Bill 1008 in conjunction with S.B. 1006 does in fact provide this type of mechanism. Under S.B. 1008 the director is granted the authority to specifically implement the 1928 constitutional amendment and limit and regulate hydropower water rights. The director has in fact been subordinating hydropower water rights since 1977 and has issued in excess of 252 such rights. What S.B. 1008 and S.B. 1006 do, is to require the director to set forth in rule and regulation form, standards under which hydropower water rights will or will not be subordinated. Those rules and regulations will, of course, come back to the legislature for their review. In effect, these two bills accomplish precisely what Mr. Runft desires; that is, 1) certainty for the holder of a hydropower water right, and 2) a procedure for evaluating whether or not the director's determination is consistent with the intent of the legislature or rather is arbitrary and capricious.

Mr. Runft's third point is that the words "state action" in section 42-203B(3) is to broad. Unfortunately, the analysis over looks the fact that minimum stream flows can only be set in accordance with state law. The negotiators specifically chose the words "state action" in contemplation of the passing of SJR 17 as this and future legislatures may wish to become more actively involved in the setting or review of minimum stream flows. We believe this latitude should be maintained.

Mr. Runft next submits that the authority to subordinate the hydropower water rights granted to the director is to broad. As noted above, when read in conjunction with S.B. 1006, it is clear that the director will be required to set standards that will be reviewed and analyzed by the Idaho Legislature. We suggest that the provision as currently phrased is adequate.

Mr. Runft next contends that the small hydro developer will be unable to obtain financing if the director has the authority to subordinate hydropower water rights. This argument is factually erroneous. To date, as mentioned above, the Department has issued over 216 subordinated water rights for power purposes. Not one of these projects had difficulty in obtaining financing and in fact many are now completing construction and are obtaining long-term financing.

Mr. Runft's objection to term permits is also without merit. The director has established a policy of issuing water right licenses for power purposes to a term consistent with the

Federal Energy Regulatory Commission license. To date both lenders and investors have found this practice to be satisfactory. We would strongly suggest that the original language remain in place as the factors cited by Mr. Runft are simply not accurate. Additionally, the director should maintain a certain amount of discretion in this area as the future predictability of the need for electrical energy or the need for additional water for agricultural purposes becomes apparent over a period of time in the future.

Mr. Runft next argues that 42-203B(6) should be amended to not affect permits which have been issued as of this date. His analysis overlooks the Hidden Springs Trout Ranch case, see 102 Idaho 623, which allows the State to restrict permits that have not yet been fully developed into property rights. There is simply no taking issue presented by 42-203B(6). The same argument would apply to Mr. Runft's suggested clarification of 42-203C(1).

Mr. Runft next recommends the deletion of the statutory language in section 42-203C(2) relating to the weight to be given to the various public interest criteria. As indicated in the earlier testimony provided by Mr. Nelson to the Committee, it is clear that if a factor does not apply, then the director would not consider it in making a determination. It is critical to a full and fair decision making process that some standard guiding the director in terms of weighing the various criteria be maintained.

Section 42-203D relates to permits not put to beneficial use prior to January 1, 1985. For consistency sake we believe that if agricultural permits are to be re-evaluated in relationship to the new law, water rights for power purposes should also be so re-evaluated.

Finally, Mr. Runft suggests that the authority of the director to suspend issuance of the permits or applications should be limited to the geographical area above Swan Falls dam. Once again this argument overlooks the fact that Swan Falls types of problems are developing throughout the State. Further, before the director may suspend issuance of permits he must make a finding of need, which is subject to judicial review. Thus, it is imperative that this legislature act to alleviate those type of problems now so that further problems are not brought forward and, of course, the resulting legal expenses to the State and private parties will thereby be avoided.

ADDENDUM M

RS11430E1

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 186, AS AMENDED

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM, AND TO PROVIDE FACTORS THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS TO CONSIDER IN LIMITING PERMITS OR LICENSES FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses.

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

(3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to

use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

(a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;

(b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);

(c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;

(d) Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

ADDENDUM N

Senate MINUTES w/ 1 Attachment

RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 6, 1985 Rm 433, 1:30 P.M.

PRESENT: Chairman Noh, Senators Beitelspacher, Budge, Chapman, Horsch, Kiebert, Little, Peavey, Ringert and Sverdsten. Senator Carlson was absent. Senator Crapo was excused.

The meeting was called to order by Chairman Noh.

Senator Budge moved and Senator Beitelspacher seconded the minutes of the previous meeting be accepted as written. Motion carried.

HCR 18 LAND EXCHANGE: HEARING, NOTIFICATION

Representative Stoicheff explained the legislation would require three actions be taken before the Land Board exchanged state land for public land: (1) a public hearing is to be held on the proposed exchange, (2) each member of the House Resources and Conservation Committee and Senate Resources and Environment Committee will be advised of the proposed exchange and (3) notice shall be published in the paper.

MOTION Senator Little moved and Senator Budge seconded this bill go out with a "do pass" recommendation. Motion carried.

HB 186 RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES

The purpose of this bill is to provide direction to the Director of Water Resources in the exercise of his authority to issue term permits for water rights for hydropower purposes. The legislation should facilitate financing for small hydro-projects by assuring adequate review of any conditions attached by the Director.

Pat Kole Mr. Kole, Attorney General's office, said they had no objection to the amendment and neither did Idaho Power or the Governor's office.

Senator Budge Senator Budge said he had the same objections to the bill as he had before as felt it was not drafted properly with any changes underlined as required by the rules of the Senate.

Mr. Kole Said that Legislative Council had approved this method of doing the amendment. He assured the committee that the only changes were the ones he outlined in his analysis of the bill. (Attached). The purpose of the bill is to give small hydro producers the same protection that Idaho Power has.

Senator Ringert — Senator Ringert said he shared some of Senator Budge's concern. He noted that it seems there would be two section of 42-203B since the one section that has passed has not been repealed.

Mr. Runft — Mr. Runft explained that they had conferred with Legislative Council and had proceeded on that advice and did not bring it back to the Senate Committee as time for introduction had run out. He said they had merely proceeded as they had been advised.

Senator Ringert — Senator Ringert said he felt this was an important piece of legislation to the people involved and if they were willing to proceed with it as written, perhaps it should be moved on.

Senator Budge — Senator Budge felt SB 1008 would be in jeopardy and not this bill.

Discussion continued on the way the bill was drafted.

Rob Holland Water Users — Mr. Holland, Idaho Water Users, said they supported this legislation and felt like it was compatible with SB 1008.

Mr. Ravenscroft — Mr. Ravenscroft said he shared Senator Budge's concern but was told by Legislative Council this was the way to handle the bill and that the Codifying Commission would take care of things, so he accepted it. The small power people face a problem of getting finances. They feel a permit for water rights should have some criteria on which the length of time is based. All the parties concerned agreed this was a desirable addition to SB 1008 and a practical measure.

Again there was more discussion on the method used to draft the bill.

Senator Ringert — Senator Ringert suggested one way to clear up this would be to ask Legislative Council to strike and underline a copy of this bill and give to the Senate when it is up for discussion.

MOTION — Senator Ringert moved and Senator Horsch seconded the bill go out with a "do pass" recommendation. Motion carried. Senators Budge and Kiebert voted no.

HB 190 — RELATING TO A FREE FISHING DAY

Ken Norrie, Fish and Game, explained the purpose of the legislation is to provide that no fishing license be required for any person to fish on a free fishing day as designated by the Fish and Game Commission. The Department sees a chance here to create some

Senate Attachment.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

February 15, 1985

The Honorable J. Vard Chatburn
Representative, District 24
Statehouse Mail

Re: House Bill No. 186

Dear Chairman Chatburn:

Enclosed herewith please find an analysis of House Bill No. 186. Pat Costello and I have prepared the analysis in a separate document as some members of the committee have expressed a desire to have the document incorporated into a statement of legislative intent. As you know, the Senate in passage of S.B. 1008 took this approach, therefore, it may be desirable for your committee to do likewise. The Attorney General's Office, as one of the negotiators to the Swan Falls Agreement, supports House Bill No. 186. It is our understanding that the Governor's office also supports House Bill No. 186 and that the Idaho Power Company has no objection to it.

If there is anything further that we can provide, please advise.

Very truly yours,

Patrick J. Kole
Deputy Attorney General
Chief, Legislative and
Public Affairs Division

PJK:ams
Enclosures

S. Attach. 1

ANALYSIS OF HOUSE BILL 186

House Bill 186 amends Senate Bill 1008 in two respects. On page 1, paragraph 3, line 40, the word "consumptive" is added between "future" and "upstream." The purpose of this amendment is to make it clear that water rights for power purposes are subject to subordination to and depletion by future consumptive upstream beneficial users. This was the intent of the original legislation and is added for clarification purposes.

The second change made to S.B. 1008 by H.B. 186 is the addition of paragraph 7 on page 2, line 23. The purpose of this change is to provide guidance to the director of the Department of Water Resources when he sets a specific term of years for a water permit or license for power purposes. The proposed amendment sets forth specific criteria which the director must consider in setting that term. The purpose of these amendments is to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects.

This does not eliminate, nor does this amendment speak to, the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

J. Attach 1

subordinate to subsequent upstream beneficial uses approved in accordance with state law. In effect, this amendment would afford, if the director appropriately found, the same protection to small hydropower producer as will exist for Idaho Power at its hydroelectric facilities should the entire Swan Falls Agreement become law. It is not the intent of this legislation to unsubordinate small hydropower water rights. The amendment also provides that small hydropower producers will be afforded due process of law prior to their subordinated water right being reallocated to other uses.

ADDENDUM O

House Attachment 1

STATEMENT BY JOHN L. RUNFT BEFORE THE
THE IDAHO HOUSE COMMITTEE ON RESOURCES AND CONSERVATION

Vard Chatburn, Chairman
February 15, 1985
1:30 p.m., House Minority Caucus Room

Subject: Testimony regarding House Bill 186 Regarding Proposed Supplemental Language to Senate Bill 1008 by adding a new subsection (7) to Section 42-203B of Senate Bill 1008

Mr. Chairman and members of the committee, for the record, my name is John L. Runft and I am an attorney practicing in Boise, Idaho. I appear before this committee representing Salmon River Hydro Company, Inc., an Idaho corporation, and Renewable Resources Development Company, a general partnership. Both of these organizations are composed of developers of small hydro-electric facilities under the Public Utility Regulatory Practices Act (PURPA). My clients are together presently developing 27 small hydro-power projects, all of which are located on the reaches of the Little and Main Salmon Rivers, and all of which would be directly and materially impacted by the legislation proposed in Senate Bill 1008. These developers have expended substantial money and time in an effort to develop their respective hydro-electric projects as envisioned under PURPA. All 27 projects have been granted preliminary permits or exemptions, or have licenses pending under the Federal Energy Regulatory Commission (FERC). Applications for water permits have either been accepted or have been granted on all of the projects by the Idaho Department of Water Resources. In summary, these are serious projects in which considerable engineering and development work has been done and in which citizens of Idaho have expended substantial sums of money and time.

In previous testimony before this committee, I have had the privilege of advising the committee that we have been able to work out a satisfactory compromise regarding the concerns the small hydro-power developers have had with Senate Bill 1008. This compromise has been worked out among my clients, other small hydro-power developers, the Idaho State Department of Water Resources, the Governor's office, and Idaho Power Company. This compromise is incorporated in and forms the essence of House Bill 186 which is before you now.

H. Attach 1

Let me state at the outset that my clients, as well as the other small hydro developers with whom we have had contact, support the sensible, needed compromise envisioned in Senate Bill 1008 and its attendant bills. Our purpose in urging passage of House Bill 186 is to accommodate the concerns of the small hydro developers without negatively impacting the purposes of and effectiveness of Senate Bill 1008. It is my understanding that Idaho Power Company has no objection to House Bill 186 and that the State of Idaho affirmatively supports this bill. House Bill 186 in effect amends Senate Bill 1008 by adding new language to Section 42-203B of Senate Bill 1008. The additions to Section 42-203B are addition of the word "consumptive" in the last sentence of subsection 3 and the addition of a new subsection 7.

The addition of the word "comsumptive" in the last sentence of 42-203B(3) merely serves to clarify and emphasize that any future depletion of the subordinated water rights held in trust is limited to consumptive upstream beneficial use by the holders of rights acquired pursuant to state law. This emphasis and limitation to consumptive use is in harmony with the purpose and meaning of Senate Bill 1008.

The proposed subsection (7) of section 42-203B contains the language meeting the principal concerns of the small hydro-power developers, and to a considerable extent this language serves to limit and modify the provisions of the preceding subsection (6) of Section 42-203B of Senate Bill 1008. My clients were concerned that the language in subsection (6) granting the director "the authority to limit a permit or license for power purposes to a specific term" is too broad. Even though the 1928 amendment to the Idaho Constitution vested in the state the power to regulate and limit the use of water for power purposes, water rights, once granted, still constitute property rights. Even though water rights for power purposes are subject to regulation and limitation by the state, such regulation and limitation must be made part of the right at the time it is granted or otherwise the exercise of such authority by the director could face the constitutional objection of taking property without due process of law.

The issue of subordination of water rights granted for power purposes is not being raised here. Subordination of these rights is viewed by all parties as a necessary element in the underlying agreements reached in forging Senate Bill 1008.

At issue here are the means and procedures through which the director's authority granted in subsection (6) will be exercised. Subsection (7) sets forth four factors, which among other factors the director must consider. These factors perform a mandatory guideline for the procedure by which the director will determine the term of years to be granted for a specific license. In shorthand, these factors require consideration of matters relating to:

H. Attach 1

(a) The length of the term of any relevant power purchase contract;

(b) Idaho Public Utilities Commission (IPUC) policy regarding the term of power purchase contracts in conjuction with the IPUC's ajudicatory administration of federal law (PURPA, FERC);

(c) The term of years in any relevant FERC license;

(d) Existing, legal downstream water uses.

The final three sentences of subsection (7) modify the foregoing language of subsection (7). These sentences provide that the determination of the term of years shall be made at the time of the issueance of the permit, or as soon thereafter as possible. They provide that the term of years shall commence upon the application of water to beneficial use. They provide that the term of years, once established, shall not thereafter be modified, except in accordance with due process of law.

Subsection (7) solves an important procedural problem arising out of the diacotomy presented by the granting of permits on one hand and licenses on the other. In exercising his authority to limit such a permit or license to a specific term of years, the term of years so designated shall apply only to the license, even though the designation may be first stated in the permit. Hence, if a permit is "proved up" and the water put to beneficial use within the permit period, then the term of years granted by the director will commence to run for purposes of the license. The license when granted will refer back to the date of application to beneficial use as the time of the commencement of the license term.

Finally, the last sentence of subsection (7) provides economic protection to the small hydro project developer. A developer's investment in a hydro-electric project can be very substantial and is generally totally commited and spent by the time the water is actually put to beneficial use. Any subsequent curtailment of the term of years in the water right is made subject to due process of law, which would require a court's consideration of economic loss faced by a developer of a project by any such time curtailment of his water right occurring under the subordination doctrine. These losses could be considerable is such curtailment results in the project owners breach of the power purchase contract with the utility to which he has agreed to supply power. Virtually all of these power purchase agreements have severe economic penalties for failure on the part of the small hydro producer to continue power production for the term of power purchase contract.

H. Attach. 1

Finally, these guidelines and due process provisions of subsection (7) will serve to create a sound, reasonable basis for considerations to be made by FERC in granting licenses to Idaho developers of small hydro and for the IPUC in exercising its policies under federal law relevant to these matters.

We respectfully urge the passage by the committee of House Bill 186.

John L. Runft

JOHN L. RUNFT, Legal Counsel
to Salmon River Hydro Company,
Inc. and Renewable Resources
Development Company
P.O. Box 1960
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House Attachment 2

ANALYSIS OF HOUSE BILL 186

House Bill 186 amends Senate Bill 1008 in two respects. On page 1, paragraph 3, line 40, the word "consumptive" is added between "future" and "upstream." The purpose of this amendment is to make it clear that water rights for power purposes are subject to subordination to and depletion by future consumptive upstream beneficial users. This was the intent of the original legislation and is added for clarification purposes.

The second change made to S.B. 1008 by H.B. 186 is the addition of paragraph 7 on page 2, line 23. The purpose of this change is to provide guidance to the director of the Department of Water Resources when he sets a specific term of years for a water permit or license for power purposes. The proposed amendment sets forth specific criteria which the director must consider in setting that term. The purpose of these amendments is to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects.

This does not eliminate, nor does this amendment speak to, the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

H. Attach 2

subordinate to subsequent upstream beneficial uses approved in accordance with state law. In effect, this amendment would afford, if the director appropriately found, the same protection to small hydropower producer as will exist for Idaho Power at its hydroelectric facilities should the entire Swan Falls Agreement become law. It is not the intent of this legislation to unsubordinate small hydropower water rights. The amendment also provides that small hydropower producers will be afforded due process of law prior to their subordinated water right being reallocated to other uses.